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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 320

ROBERT W. JAFFKE, *Petitioner*,

v.

WILLIAM C. DUNHAM, *Trustee* of the Estate of Robert L. Knetzer, Bankrupt, *Respondent*.

BRIEF AND OPPOSITION OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI

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I.

REPLY TO REASONS FOR GRANTING THE WRIT.

A. THE PETITIONER IS BOUND BY ADMISSIONS IN HIS BRIEF SUPPORTED BY THE RECORD, AND IS ESTOPPED TO OBJECT TO THE CONSIDERATION OF THE INDICTMENT.

The petitioner has given no reason to justify the assertion of jurisdiction by this court for the purpose of reviewing the action of the United States Court of Appeals in regard to its decision rendered May 2, 1957. The petitioner apparently concluded that the Court of Appeals in support of its reversal of the trial court's judgment, considered petitioner's Exhibit 30, being the indictment against Robert L. Knetzer for obtaining money under false pretenses, where that Exhibit had been stricken in the trial court at the instance of the respondent. These observations are apparent:

1. It was not necessary for the court to rely on the Exhibit for the reason that as the Court of Appeals noted, petitioner stated on page 19 of his brief in the Court of Appeals, that as a result of the grand jury hearing an indictment was returned against Knetzer on May 8, 1952, charging him with having obtained money by false representations from Jaffke in an amount exceeding $5,000 which was transported across State lines. This was a direct admission of this fact and it has been consistently held, at least where the statement of fact in the brief is not directly contrary to the record, that this is an admission against the party and relieves the court of resting a fact upon its judicial notice.

1. **Young & Vann Supply Co. v. Gulf F. & A. Ry. Co.**, 5 F. (2d) 421; CCA 5th, 1925, p. 423;
2. **Mandelbaum v. Goodyear Tire & Rubber Co.**, 6 F. (2d) 818; CCA 8th, 1925, p. 824;
3. **Oscanyan v. Arms Co.**, 103 U.S. 261, 26 L. Ed. 539; 1880, p. 263-265;
4. *Lemley* v. *Christophersen*, 150 F. 2d 291, CCA 5th, 1945, p. 292;
5. *Pitcairn* v. *Philip Hiss Co.*, 113 F. 492, CCA 3rd, 1902, pp. 494-495.

2. That petitioner is estopped to object to the consideration of the indictment itself for the reason that he injected this indictment in the record himself in questioning the respondent (Tr. 89) and this matter was not stricken from and is a part of the record. Furthermore, petitioner referred this Exhibit to the court obviously to lend weight to his assertion that he had been defrauded by Knetzer and it is strange indeed for him now to say that the court cannot consider the indictment in questioning the trustworthiness of Knetzer in making the affidavit relied upon by petitioner. This is contrary to the decisions of this court to the effect that an appellant cannot complain of errors in law in admission of his own evidence.

1. **Sprigg v. Bank of Mt. Pleasant**, 14 Pet. 201; 10 L. Ed. 419;
2. **Chicago & E. I. R. Co. v. Collins Produce Co.**, 249 U.S. 186, 39 S. Ct. 189, 63 L. Ed. 552.

3. The Court of Appeals did not initiate a rule that the losing party in the District Court may use evidence stricken on his own motion as a basis for the reversal of the trial court's judgment for the reason that, as appears from the order of the District Court (Tr. 167) petitioner's Exhibit No. 30 was stricken by the trial court. Any use of the indictment by the Court of Appeals was to sustain the trial court in the correctness of his ruling to the effect that the affidavit of Robert L. Knetzer was not admissible in evidence. Thus the use of the indictment was to sustain the trial court and not to reverse the trial court. It is, therefore error to assert that the decision of the Court of Appeals is contrary to this court's decision that petitioner could urge any ground in the record in support of the trial court's judgment. Under the same authorities petitioner relies upon, the respondent would have had no

standing to appeal the striking of the affidavit and indictment even if he had so desired, as the rulings of the court on this issue were in his favor. When the petitioners placed these documents in the record, the Court of Appeals had every right to consider them.

a. Petitioner has cited no cases in point to indicate that the action of the Court of Appeals is contrary to the decisions of this court or which indicate that this court has ever considered the exact issues raised on this matter of appellate procedure to be of sufficient importance to devote its time for a determination.

II.

THE AFFIDAVIT OF ROBERT L. KNETZER WAS PROPERLY STRICKEN BECAUSE IT WAS NOT MADE UNDER THE CIRCUMSTANCES RENDERING IT TRUSTWORTHY.

Petitioner stated on page 8 of his petition that the question of whether or not the declarations of the bankrupt fell short of having been made under circumstances rendering them trustworthy went to the weight of the evidence and not to its admissibility. Petitioner cites in support thereof the case of *F. W. Woolworth Co.* v. *Contemporary Arts*, 97 L. Ed. 276; 344 U.S. 228, 73 S. Ct. 222. This case does not so hold and is no authority for any such statement, but merely holds a party cannot complain of exclusion of evidence in response to his own objection. Petitioner cites Corpus Juris Secundum Volume 31, Section 217, page 959, but failed to emphasize one of the requirements for the admissibility of the declaration against interest noted in this section, and that is, that the circumstances rendered it improbable that a motive to falsify existed. Likewise on page 963 it is indicated that the declarant must have a pres-

ent interest at the time of the declaration and that declarations of a former owner of property are excluded, and on page 965 it was noted that to render a declaration against interest admissible there should be a circumstantial guarantee of the trustworthiness of the declaration.

The Illinois cases cited on page 9 establish no doctrine to the effect that the court may not condition the admissibility of the declaration against interest on its being made under circumstances so as to render it trustworthy. The case of *Keshner* v. *Keshner*, 376 Ill. 354, 33 N.E. (2d) 877, involved a citation to discover assets and the court did allow the donor to impeach a gift of some United States bonds by admitting into evidence a letter he had written alleging among other things that the bonds which his daughter had in her safety deposit box belonged to him. In the cases of gifts of property, this is contrary to a later case, *Houdek* v. *Ehrenberger*, 397 Ill. 62, 72 N.E. (2d) 837, and an earlier case, *Whipple* v. *Carrico*, 305 Ill. 164, 137 N.E. 84, cited in Section 326, 31 Corpus Juris Secundum, page 1104. This case was not expressly overruled in the Keshner case. The Keshner case is likewise contrary to other Illinois cases where sales of both realty and personalty, and not gifts of property, were involved.

1. **Myers v. Kinzie**, 26 Ill. 36; (Insolvency);
2. **Dausch v. Barker**, 329 Ill. 410, 160 N.E. 765;
3. **Cook v. Korshak**, 301 Ill. 603, 134 N.E. 49;
4. *Milling* v. *Hillenbrand*, 356 Ill. 310, 40 N. Ed. 941;
5. *Illman* v. *Kruse*, 301 Ill. 408, 134 N.E. 107.

The case of *Friberg* v. *Donovan*, 23 Ill. App. 58, merely involved a declaration by a deceased maker of a note that a certain party was a surety on the note although this fact did not appear on the face of the instrument. The case

of *Hughes* v. *Eldorado Coal and Mining Co.*, 197 Ill. App. 259, involved a situation where under an action for wrongful death, the statement of the deceased buddy corroborating the defendant's theory as to the cause of an explosion in the mine was admitted as a declaration against interest where the declarant was also injured by the same explosion. *Schell* v. *Weaver*, 225 Ill. 158, 80 N.E. 95, was a case in which the decedent had admitted that he owed a certain person $1,000 borrowed money and some interest. This was admitted as a declaration against interest in an action on the loan. The case of *In re Thompson*, 295 F. 556 was also before the court in 197 F. 681 and involved a reclamation proceeding. In those cases the court admitted the sworn statement made by the bankrupt at a creditor's meeting although the bankrupt was at that time deceased. These were the only statements allowed in evidence which were made after the bankruptcy of the debtor and the court specifically stated on page 683 in 197 Federal Reporter as follows:

> "'*Such testimony is not to be classed with declarations made out of court.* It is judicial in its nature and with reference to it the trustee may properly be said to be in privity with the bankrupt, and, while not concluded by the bankrupt's admissions made therein, they are admissible against him in controversies arising in such bankruptcy proceedings.' (Italics ours.)"

The only oral statements which the bankrupt in the foregoing case made outside of court disclaiming ownership were all made prior to the time of the petition in bankruptcy, and at a time when the bankrupt was in possession and using the dredge which was the subject of the reclamation proceedings. The case of *Clark and Jones* v. *American Mutual Liability Insurance Co.*, 112 F. Fed. Supp. 889, involved an admission by an employee who stated that for the five year period prior to the time of his statement,

he had appropriated plaintiff's funds in the amount of $6.50 per day. Declarant was dead at the time of the action on the comprehensive claims insurance policy against the insurer. These facts were set up in the complaint and the court refused to strike them as they felt that this matter constituted an admission against interest by the declarant and should be admitted in the action.

These cases all have one thing in common, and that is, that there was nothing in them which would indicate any motive for misrepresenting the statement made. The possible exception is the *Kreshner* case which is not consistent with all of the other Illinois authorities in that those representing the alleged donor of property were allowed to impeach a previously executed gift, although the case was not clear as to when the gift had been supposedly made. Furthermore, none of these cases set forth any doctrine which would indicate that the Court of Appeals committed error under the Illinois law by considering whether the circumstances were such as to render the statements in the affidavit of Knetzer trustworthy.

It is apparent from the face of the affidavit itself, it being petitioner's Exhibit 24 (Tr. 203) that petitioner's statement on page 10, that Knetzer by the affidavit admitted doing the acts which were the essential elements of the crime for which he was charged in the indictment, is incorrect. Knetzer merely admitted that during the period of December 7, 1950 to October 23, 1951, that he "borrowed" the sum of $47,380.00 from Robert W. Jaffke. This is no more than he had previously admitted in the informal conference before Judge Briggle as set forth in petitioner's Exhibit 29, where he was represented by counsel for petitioner and assured the court that he would raise the money to pay on the turn-over order, but that he had no intention of using illegal means and would not do so.

If the statement made on page 10 by the petitioner is correct, that there is nothing in the affidavit which questions title to the money, it would appear that petitioner's case is defeated. He sought to raise a constructive trust which is a property relationship, and necessarily requires him to trace his property to any third party into whose hands it may have come. Certainly it was in derogation of the title of the trustee to say that some of the money in his hands is money subjected to a constructive trust on behalf of another. Petitioner's statement is true, he has no more than a contract claim and should be relegated to the position of any other creditor of Knetzer's.

III.

THE COURT OF APPEALS FOLLOWED THE MANDATE OF THIS COURT AND CORRECTLY CONSIDERED THE ILLINOIS LAW ON CONSTRUCTIVE TRUSTS.

The petitioner continually harps on the statement that the trustee in bankruptcy should have investigated the source of the funds which Knetzer paid over to him from time to time. The complaint here is being made by the same petitioner who has sustained his contention in the trial court that Knetzer defrauded him, who himself admitted that he later knew that Knetzer could not be trusted. The evidence shows that Knetzer never paid by anything but cash and would have been ridiculous in view of his reputation to suppose that any questioning by Dunham would have resulted in a truthful discourse by Knetzer when he obviously lied under oath when he appeared before Judge Briggle. Dunham certainly did all that he could to faithfully discharge his duties.

The petitioner cites several cases on page 12 which he

claims support his statement that the recent Illinois decisions place a lesser burden on a claimant in identifying his property in establishing a constructive trust. These cases support no such contentions. The cases of *Winger* v. *Chicago City Bank and Trust*, 394 Ill. 94, 67 N. E. (2d) 265; *The People* v. *State Bank of Maywood*, 354 Ill. 519, 188 N. E. 853 are not in point on the facts, as the *Winger* case was a case where the policy holders of an association sought to raise a constructive trust because certain directors dealt with the property of the association to their own advantage. The court placed the same burden of identification of property on the plaintiffs, but did say that where there was a fiduciary relationship such as a trustee, and he commingles trust funds with his own property, that the burden is upon him to show what was his individual property before the commingling took place.

The *People* v. *State Bank of Maywood* case was a proceeding by the receiver appointed by the State Auditor to liquidate an insolvent bank wherein the Village of Maywood sought to establish a preferred claim because the bank accepted deposits illegally in an amount in excess of the sum of which the Village held in surety bonds to protect the deposit. Respondents regard this case as setting forth in excellent fashion the law of Illinois, and that case noted this doctrine of Illinois on proof of tracing, that, if at any time the withdrawals from the commingled account leave a balance less than the trust money, that fund must be regarded as dissipated except as to this balance and deposits substantially added to the account from other sources may not be attributed to the trust fund. The gist of this case is therefore that petitioner not only held the burden of proof that Knetzer received his money, but he must prove that where it was obviously commingled that Knetzer at all times held a balance

equal to or in excess of the trust money paid over to him and that this trust money was delivered to Dunham, the trustee in bankruptcy, where it still remains. This, petitioner has obviously failed to do. The proof of tracing is woefully weak.

The following chart, we believe, is a pretty clear picture as to the transactions involved, and is taken from the record and is what was used by the Circuit Court of Appeals in reaching the conclusion that it did.

Riley testified that he paid Knetzer as follows:		Jaffke testified that he paid Knetzer as follows:		Petty testified that he paid Knetzer as follows:	
6-28-50	250	12-7-50	6,100	4-14-51	5,000
6-30-50	1,000	12-13-50	12,500	4-29-51	7,500
7-2-50	600	12-18-50	7,500	5-4-51	8,500
7-18-50	6,000	12-21-50	9,000	5-10-51	8,000
7-27-50	9,000	1-3-51	6,000	5-28-51	14,500
8-2-50	200	1-8-51	1,000	6-51	500
8-10-50	8,000	3-14-51	520		
8-15-50	2,208	5-21-51	260		$44,000
9-12-50	2,831	Aug. 51	300		
9-15-50	2,300	Oct. 51	2,000		
		Oct. 22, 51	2,800		
	$32,389		$47,980		

It was stipulated that Gerald Sammons paid to Knetzer between October 1, 1951, and February 1, 1952, the sum of $101,550.00.

The Trustee was called as an adverse witness by the petitioner and asked about the dates when he received monies on the turn-over order. It must be remembered that his interrogation was limited to monies received between

October 19, 1950 and November 1951 (R. 87). The dates, by whom paid and to whom, and the amounts are as follows: (R. 77-87)

	Monies paid direct to	
Dec. 8, 1950	G. W. Horsley	5,000
Dec. 13, 1950	Currency from Robert L. Knetzer to Dunham	3,500
Dec. 22, 1950	Knetzer paid to Horsley	1,500
Jan. 1951	No payments	
Feb. 1951	No payments	
Mar. 1951	No payments	
Apr. 9, 1951	Knetzer paid to Horsley	5,000
Apr. 14, 1951	Attorney Cohn paid to Dunham	5,000
Apr. 19, 1951	" " " " "	5,000
Apr. 23, 1951	" " " " "	5,000
May 1, 1951	" " " " "	5,000
May 7, 1951	" " " " "	5,000
May 10, 1951	" " " " "	5,000
May 21, 1951	" " " " "	5,923.72
May 24, 1951	" " " " "	5,000
May 29, 1951	" " " " "	5,000
June 4, 1951	" " " " "	5,000
Oct. 11, 1951	" " " " "	5,000
Oct. 21, 1951	" " " " "	5,000
Nov. 13, 1951	Rex Rhodes paid to Dunham	1,000
Nov. 14, 1951	" " " " "	1,000
Nov. 15, 1951	" " " " "	1,000
Nov. 16, 1951	" " " " "	1,000
		$ 79,923.72

Thus, it is apparent, from the foregoing, that Jaffke testified that he gave to Knetzer the sum of $42,100.00 during the period from December 7, 1950 through January 8, 1951. However, the Trustee received on the turn-over or-

der, either from Knetzer or anyone for and on his behalf, during that same period of time, only the sum of $10,000.00. It is further significant to note that the petitioner testified that he gave to Knetzer $6,100.00 and knew that it was for the purpose of being applied on the turn-over order. It is further significant that during the months of January, February and March, the Trustee did not receive any payments on the turn-over order. During the period from January 8, 1951 through October, 1951, Jaffke testified that he advanced to the Bankrupt only the sum of $1,080.00. Yet, during that same period of time, a man by the name of Petty testified that he gave to Knetzer the sum of $44,000.00, and it is further significant that, beginning on April 9th, Knetzer paid $5,000.00 to the Trustee and thereafter Attorney Cohn paid to the Trustee several sums of money, which, up to November 1st, totaled $65,923.72.

Thus, the Circuit Court of Appeals properly analyzed this situation in its opinion when it said:

> "The total amount paid to Knetzer by these four men was $225,919.00. Of this amount Knetzer paid to the Trustee during the period here in question only $79,923.00. It is evident, therefore, that $145,996.00 of the amount Knetzer received from these four men was not paid over to the Trustee."

The Court then goes on to analyze the exact periods of payment, matching them up with the dates when Jaffke testified that he gave Knetzer money, and finds that the payments to the Trustee could have been made by any one of the men.

The most significant fact is that Attorney Cohn was called as a witness by the petitioner, but he does not shed any light whatsoever upon the tracing of the funds. His only statement was that he paid the money to the Trustee and part of it came from the Bankrupt and part of it came

from other persons, whom he did not identify. He, therefore, in effect disproved petitioner's theory because he did not testify that the petitioner ever gave him any money and that although the petitioner was in his office one time in the company of the Bankrupt, it was not on an occasion when the Bankrupt gave him any money.

In fact, Attorney Cohn testified that during the period, April 14, 1951 to November, 1951, he paid approximately $70,000.00 to the Trustee and could only say that more of it was paid to him by the Bankrupt than any other person. Even if we assume that $35,000.00 of it was paid to him, it is less than the $44,000.00 which Knetzer received from Petty during that same period of time, a time during which Jaffke testified that he did not pay anything to the Bankrupt, except for a small sum during the summer which amounted to approximately $1,000.00. Therefore, if petitioner is relying upon inferences, then his own witness, by inference has proved that it was not his funds that came into the hands of the Trustee but the funds of Clint Petty or someone else. (R. 134-135.)

Furthermore, petitioner himself testified that he had no personal knowledge, other than as to the first $6100.00, how much of his money was turned over to Dunham by Knetzer. (Tr. 126.) The remaining two cases of *Edgerton v. Johnson*, 178 F. (2d) 106 and *Soderstrom v. Kawasheha Packing Co.*, 169 F. (2d) 1008 merely reiterate the same presumption where there has been commingling by the trustee, which respondents contend adds and does not detract from the troubles which petitioner has in attempting to trace his property into the hands of William C. Dunham.

The Illinois cases cited by petitioner sustain the contentions of respondents, that petitioner cannot trace his property and is therefore not entitled to a priority in this

reclamation proceeding. *St. Louis & San Francisco Co. v. Spiller*, 47 S. Ct. 635, 274 U. S. 304, 71 L. Ed. 1060; *In re Harrigan Supply Co.*, 2 Fed. (2d) 791; *Board of Commissioners v. Strain*, 157 Fed. 49, 84 CCA 553; *John Deere Plow Co. v. McDavid*, CCA 8th 1905, 137 Fed. 802; *In re A. D. Matthews & Sons*, 238 Fed. 785. Likewise the burden is upon the petitioner to trace his funds into the hands of the trustee in bankruptcy. *Schuyler v. Littlefield*, 232 U. S. 707; Volume 5A, Remington on Bankruptcy, 1950 Edition, Section 2480, pages 291 and 292; Section 2925, page 92, Volume 4, Trusts and Trustees, Bogert, 1748. The case of *Standard Oil Co. of Kentucky v. Hawkins*, 74 Fed. 395 adds nothing to the position of petitioner because it was merely a case where a bank under the active supervision of the president on the last day it was open, accepted a deposit from the plaintiff knowing that it was insolvent. The receiver of the bank had paid out a 25% dividend to the creditors after plaintiff had filed a claim as a general creditor, but the court allowed him to withdraw it and seek a preferred claim on the basis of a trust. There is no question, as the court indicated on page 402, that the funds of the plaintiff were traced to and received by the receiver. This is in sharp distinction to our case where the proof falls short of tracing the funds into the hands of the trustee in bankruptcy.

The remaining case cited by petitioner is *City of New York v. Reisner*, 127 F. (2d) 703. This was a case where the New York City Sales Tax Law specifically made the vendor a trustee for the City in regard to sales tax money. The New Bedford Rest Period, Inc. filed a petition for reorganization and remained in possession; however, it failed to segregate the taxes collected from vendee as required by the sales tax statute. The court held that there was nothing in the bankruptcy law to prevent the City of

New York from being given a statutory lien for the sales tax money and since the debtor was operating under the control of the bankruptcy court, it was not necessary to trace the fund due the City. In view of this breach of statutory duty by the debtor in possession, under the authority of the bankruptcy court, the case is readily distinguishable from the instant case.

The court, in its decision, considered the Illinois law on the question of constructive trusts on page 3a of the opinion, but correctly held that petitioner had fallen short in his proof of tracing his funds into the hands of the trustee in bankruptcy. The Court of Appeals certainly placed no greater burden on the petitioner than was required by both the Illinois decisions and the decision of this court.

WHEREFORE, William C. Dunham, trustee of the estate of Robert L. Knetzer, deceased, bankrupt, petitioner, prays this Honorable Court to deny this petition for certiorari to the United States Court of Appeals for the 7th Circuit so that the mandate can issue from the Court of Appeals and the administration of the bankrupt estate concluded with due dispatch.

Respectfully submitted,

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